U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7500
(202) 693-7365 (FAX)

In the Matter of

LINDA M. WILSON
Claimant

v.

NAVY EXCHANGE SERVICE
Employer

and

CRAWFORD & COMPANY
Insurer

Date Issued: June 26, 2001

Case No.: 1999-LHC-2849
OWCP No.: 06-158698

APPEARANCES: Ms. Patricia Walters, Personal Representative
For the Claimant

Mr. R. John Barrett, Attorney
For the Employer

BEFORE: Richard T. Stansell-Gamm
Administrative Law Judge

**DECISION AND ORDER -
MODIFICATION**

This case involves a claim filed by Ms. Linda M. Wilson for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 - 950, as amended ("the Act"). The claim relates to a back injury Ms. Wilson suffered on January 29, 1994. I conducted a hearing in Charleston, South Carolina, on March 29, 2000 (ALJ I and ALJ II).[1] Ms. Wilson, Ms. Walters, and Mr. Barrett were

[1]CX - Claimant exhibit; EX - Employer exhibit; TR - Transcript; and, ALJ - Administrative Law Judge

(continued...)

present. My decision in this case is based on the hearing testimony and all the documents admitted into evidence: CX 1 to CX 7 and EX 1 to EX 11.

Procedural History[2]

On November 14, 1996, Administrative Law Judge Edith Barnett, signed a Decision and Order, 1995-LHC-1840, granting Ms. Wilson compensation for a permanent total disability. In July 1999, Mr. Barrett, on behalf of the Employer, requested a hearing with the Office Administrative Law Judges to consider whether modification of Judge Barnett's order was appropriate. Pursuant to a Notice Hearing, dated January 3, 2000, as subsequently amended, I held the hearing in Charleston, South Carolina, on March 29, 2000.

ISSUES.[3]

1. Whether Judge Barnett's award to Ms. Wilson of permanent total disability compensation should be modified due to a mistake of fact.

2. Whether Judge Barnett's award to Ms. Wilson of permanent total disability compensation should be modified due to a change in condition.

   A. Whether a change of condition has occurred.

   B. If a change in conditions has occurred, determination of extent of disability.

3. If a change in the extent of disability has occurred, determination of appropriate disability compensation.

Parties' Positions

---

[1](...continued)
exhibit.

[2]At the close of the hearing, I raised the possibility that another medical examination may be warranted considering the date of the most recent medical opinion in the record (TR, page 94 to 101). Ms. Wilson seemed amendable but Mr. Barrett objected and asked that I defer my decision until the submission of all the medical evidence. Upon receipt of the Employer's post-hearing submissions, including Dr. Lucas' observations of April 13, 2000, I decided not to remand this case for further medical evaluation.

[3]Although Ms. Wilson submitted a list of medication expenses, she did not specifically indicate that medical treatment was an issue for me to resolve. Ms. Wilson also indicated that Medicare had paid the medication bills.

Employer

In October 1998, Ms. Wilson's activities during a move were videotaped. The film shows Ms. Wilson engaged in lifting and climbing activities without any noticeable signs of pain or discomfort. When this tape was shown to her treating physician, Dr. Nicholson, he removed some of the physical limitations that he had previously imposed on Ms. Wilson. His earlier physical limitations had been the basis for a finding of permanent total disability. After reviewing the medical record and videotape, another medical specialist opined Ms. Wilson could return to her former job at the Navy Exchange. Neither physician observed any signs of pain behavior in the videotape. A labor market expert then surveyed the local job market in light of the less strict physical standards and found suitable alternative employment with wages that exceed her pre-injury average weekly wage. Consequently, modification of the original compensation order is appropriate since Ms. Wilson's medical condition has improved to the extent that she is capable of work. Likewise, the Employer has demonstrated the presence of suitable alternative employment in the local area (TR, pages 33 and 34; and, post-hearing brief).

Claimant

In a post-hearing letter, Ms. Wilson reiterates that she suffers from constant pain, which varies in intensity. She questions whether Mr. Barrett understands the extent of her pain. She asserts that counsel has failed to contact each employer in the listed jobs to see if she could hold down the job. Apologizing for a lack of legal expertise, Ms. Wilson simply asks that her case be given full consideration.

Evidentiary Issues

Post-Hearing Depositions

Because Mr. Barrett received insufficient notice that Mr. McDonald would testify as a witness, I gave him the opportunity to conduct a post-hearing deposition of Mr. McDonald concerning his actions in the videotape (EX 1) (TR, page 19). I also gave Mr. Barrett permission to depose, if necessary, the investigator who conducted a pre-hearing interview with Mr. McDonald. On April 25, 2000, Mr. Barrett notified me that he did not intend to submit anything further in regards to Mr. McDonald.

Additional Employer Exhibits

Mr. Barrett requested that he be permitted to introduce, post-hearing, the treatment notes from Dr. Nicholson's February 1999 office visit with Ms. Wilson (TR, page 92). I approved his request and received the document on April 3, 2000. I now admit the treatment note as EX 8.

Because Ms. Wilson failed to give Mr. Barrett sufficient notice about two of her exhibits relating

to Dr. Lucas (CX 4 and CX 5), I gave him 30 days post-hearing to submit an evidentiary response (TR, pages 31 and 32). On April 25, 2000, Mr. Barrett submitted three additional documents, marked EX 9, EX 10, and EX 11, concerning Dr. Lucas' medical opinion about Ms. Wilson. Ms. Wilson did not enter an objection to these exhibits. Since the post-document supplement the information in CX 4 and CX 5, and absent any objection, I now admit EX 9, EX 10, and EX 11 into evidence.

SUMMARY OF EVIDENCE

While I have read and considered all the evidence presented, I will only summarize below the information potentially relevant in addressing the issues in this case.

Sworn Testimony Presented by the Employer

Ms. Lynn M. McCain
(TR, pages 36 to 52)

[Direct Examination] Ms. McCain is the rehabilitation consultant who prepared the labor market survey, labeled EX 6. Prior to conducting the survey, she reviewed Ms. Wilson's medical information including Dr. Nicholson's restrictions of sedentary and light duty work. Ms. McCain also noted Ms. Wilson's prior employment at the Navy Exchange as a sales associate. Ms. McCain prepared the survey in the Fall of 1999.

While conducting her survey for jobs, Ms. McCain contacted employers by phone and obtained information from the South Carolina Employment Security Office. Through this process, she identified 23 jobs that were suitable for Ms. Wilson. Both Dr. Nicholson and Dr. Kirven approved the jobs. The unemployment rate is low and workers with retail experience are in great demand. Ms. McCain has placed people in jobs who had the same or worse physical restrictions as Ms. Wilson.

Based on her understanding of the local job market, Ms. McCain believes Ms. Wilson has the opportunity to earn between the minimum wage of $5.15 and $8.35 (the average wage of most jobs). Ms. McCain prepared a table showing current employment levels in various categories. According to this data, a moderate number of workers with a high school or less education are working in sedentary or light duty jobs in the local area. In her opinion, these jobs listed in the survey would also have been available in October 1998.

[Cross Examination] Most of the listed jobs involve sedentary work with a person sitting at least two-thirds of the time. An employee might be able to get up and move around for a short period of time.

Concerning the effects of medication, Ms. McCain defers to the physicians. She observed that

usually the doctors who prescribe the medication are the same doctors who establish work restrictions. She assumes they consider the effects of medication. If a person is taking narcotic medication on a chronic basis that adversely affects that person's ability to drive and concentrate then there would be a problem at the work site.

[Re-Direct Examination] None of the medical records Ms. McCain reviewed imposed any work restriction due to medication. Likewise, the records did not contain any duration limitations on standing or sitting.

Documentary Evidence Presented by the Employer

Surveillance Videotape
October 1998 (EX 1)

This exhibit consists of three videotapes. Tape 1-2 contains video footage of Ms. Wilson's public activities on October 2, 1998. Tape 1-3 covers October 3, 1998. And, Tape 1-1 is a composite 15 minute videotape. I have carefully reviewed all three tapes. Due to the nature of this litigation, I feel compelled to set out my observations in detail.

October 2, 1998, 8:50 a.m. to 9:02 a.m. Ms. Wilson and a man load a cabinet with a glass front onto the bed of a pickup truck. As the man stands in the bed and pulls the cabinet up, Ms. Wilson boosts the bottom of the cabinet up to the bed by lifting it with both arms. Afterwards, Ms. Wilson simply wipes her brow with her left hand and returns to the building and shortly thereafter helps the man carry out a small but apparently heavy, cabinet. A close-up of Ms. Wilson's face shows that she is animated and expressive. She does not grimace or show any outward signs of pain. After the truck is loaded with some items, Ms. Wilson closes the building door, gets into her car and leaves.

October 2, 1998, 9:18 a.m. to 9:41 a.m. Ms. Wilson departs a building carrying in her left hand, several clothes on hangers. She walks normally and appears to be carrying the clothes without great effort. Upon reaching a car, she bends over and places the clothes in a trunk. Ms. Wilson then returns to the building entrance walking normally. Ms. Wilson makes two trips with clothes and then makes numerous trips from the building to the car, placing several items, bags and boxes in the back seat of a car while leaning through the passenger door. In a close-up view of her face, Ms. Wilson shows no signs of distress or discomfort.

October 2, 1998, 10:14 a.m. to 10:34 a.m. Ms. Wilson and a man carry a chest and a china cabinet top from the bed of a pickup truck and move them to a building about ten feet away. She next removes several clothes on hangers from a car trunk and carries them into the building in both hands. For the next ten minutes, at a steady pace, Ms. Wilson and the man continue to unload household articles and clothing from the trunk and the car. Ms. Wilson's lifting, carrying, and walking movements are remarkably

unrestricted. She favors neither side of her body during these activities and keeps a steady pace consistent with the man's efforts. She displays no physical signs of any disability.

October 2, 1998, 11:08 a.m. to 11:30 a.m. At a different building, Ms. Wilson and a man load several small to medium size furniture items into a pickup truck. Ms. Wilson is able to freely move about, carrying and lifting her half of the load. At one point, she assists the man by lifting the top piece to a desk over the side of the bed panel; during this movement, she is lifting the piece almost level with her head.

October 2, 1998, 11:45 a.m. to 11:58 a.m. Ms. Wilson and a man unload several furniture items from a pickup truck including the desk top, a small sofa, a one-drawer desk top, and a small cabinet. During each trip, Ms. Wilson carries one end of the piece of furniture and clearly is bearing at least one half of the item's weight. Ms. Wilson never hesitates to carry her share. She displays no signs of weakness or pain.

October 2, 1998, 1:07 p.m. to 2:08 p.m. Ms. Wilson resumes loading a car with household articles. Usually, the items do not appear heavy, but Ms. Wilson does use both hands and arms to carry the items. She makes seven trips between the building and her car over the course of ten minutes. After the pickup truck arrives, Ms. Wilson and a man maneuver a refrigerator through the front door out to the front porch area. The regular-size pickup truck is backed up to the entrance and nearly level with the porch. Ms. Wilson steps from the rear of the bed of the truck to the ground, a drop of about two feet. She walks to her car several feet away, retrieves a blanket from the trunk and returns to the truck. Ms. Wilson raises her right leg up and places it on the truck's tailgate. In that position, her right knee is also level with her chest. Then, grasping the side of the truck's panel wall, she hoists herself up and steps on the tailgate. At that point, Ms. Wilson assists the man in attempting to load the refrigerator in the truck, which requires her to help him raise the refrigerator upright and turn it. During this sequence, Ms. Wilson's movements are fluid and unrestricted. She demonstrates no hesitation in assuming numerous positions to maneuver the refrigerator. Ms. Wilson and the man then load another couple of items of furniture. Ms. Wilson and the man carry a two-seat sofa, which is turned on its side, out to the truck flatbed; he is walking backwards. Over the course of this hour, Ms. Wilson bends, walks, twists, hops, climbs, and moves without demonstrable effort. She never favors her back or right side when walking, lifting, climbing, or standing.

October 2, 1998, 2:24 to 2:40 p.m.. Ms. Wilson carries her end of the sofa without difficulty while they move toward an entrance. Although she stumbles over a porch step, Ms. Wilson quickly recovers and continues carrying the sofa into the building. They next unload the refrigerator with Ms. Wilson's helping to lower the item onto a hand truck. She then initially pulls the hand truck carrying the refrigerator toward the entrance while walking backwards. At the door, they switch positions and Ms. Wilson pushes the refrigerator forward while the man pulls the handcart. At the entrance steps, they pause for a moment and then Ms. Wilson lifts the end of the refrigerator up as the cart's wheels travel up and over the step. She completes that maneuver twice. A few minutes later, she carries a load of clothes into the

building. Again, all her movements are fluid and conducted without any hesitation. Ms. Wilson demonstrated no problems moving these items.

October 2, 1998, 3:04 p.m. Ms. Wilson exits a car without any difficulty. Throughout the videotape, Ms. Wilson showed normal dexterity in entering and exiting a car. She also walked at a normal gait without any walking aid. Ms. Wilson did not have a limp.

October 2, 1998, 3:20 p.m. to 3:46 p.m. Ms. Wilson makes numerous trips from the building to the car, carrying household items, clothes and plants. She packed both the trunk and the seats of the car with the articles. Ms. Wilson's movements seemed unrestrained and unaffected by pain.

October 3, 1998, 9:17 a.m. to 9:52 a.m. The next day, without any signs of fatigue, Ms. Wilson resumes her moving activities. On this day, in addition to a man, Ms. Wilson is assisted by two other women. While Ms. Wilson is observed through an open doorway moving within an apartment and climbing up and down the front stairs, the man who assisted her the day before and the two other women load the pickup truck with more furniture. They also place numerous household articles into a car.

October 3, 1998, 10:11 a.m. to 10:24 a.m. Ms. Wilson carries numerous articles into a building. On one occasion, she stoops, by bending at the waist so that her back is parallel to the ground, flexes her knees, and picks up two dresser drawers filled with articles, which are stacked on the ground next to the rear of a car. Ms. Wilson fluidly moves during the entire lifting process. Once she firmly grips the bottom drawers, Ms. Wilson smoothly stands straight up, lifts both drawers, and carries the load into the building. Next, Ms. Wilson bends at the waist to lean into the back door of a car and removes two more dresser drawers and places them on the ground at the rear of the car. Again, all of Ms. Wilson's physical actions, including her neck, back, arm, and leg movements, appear to be completely normal. She is actively engaged in moving items and an active participant in the unloading process. Other than some apparent perspiration, Ms. Wilson bends, lifts and carries without signs of stress or discomfort.

October 3, 1998, 11:03 a.m. to 11:15 a.m. Ms. Wilson is visible through an open door way sweeping the floor. Several minutes later, Ms. Wilson enters the driver's side of a car with a cup in her right hand. In one uninterrupted sequence, she bends, enters the car, places the drink in a cup holder, and twists at her waist to place an object from the front seat to the rear seat. Ms. Wilson accomplishes this maneuver without any hesitation or sign of discomfort.

October 3, 1998, 11:23 a.m to 12:03 p.m. While other people unload a bed from the pickup truck, Ms. Wilson unloads the trunk and interior of a car. On one trip, she carries a box under her left arm and a water jug in her right hand. To reach household items in the car's interior, Ms. Wilson stoops and leans through a car door without effort.

October 3, 1998, 12:25 p.m. Ms. Wilson carries an animal cage to the car and places it in the

trunk without effort. She then reaches up overhead to grab the trunk lid and closes it.

October 3, 1998, 12:43 p.m to 1:14 p.m. Ms. Wilson utilizes a bending motion to reach into a car and remove an animal cage. She does not appear to guard her bending motion. Ms. Wilson walks briskly around the entrance to a building.

Surveillance Report
October 7, 1998 (EX 2)

The individual who videotaped Ms. Wilson's move on October 2, 1998 explained in detail the sequence of the filming. Starting in the morning of October 2, 1998, the individual shot slightly over six hours of video, documenting Ms. Wilson's activities during her move to a new apartment.
On the second day, two surveillance teams monitored Ms. Wilson's activities.

Medical Record Review - Dr. Felix M. Kirven
December 1, 1998 (EX 3 and EX 4)

On December 1, 1998, Dr. Kirven, a board certified orthopaedic surgeon,[4] conducted an extensive review of Ms. Wilson's medical record and the course of her treatment.

1994 According to the record, on January 29, 1994, as Ms. Wilson set down a case of liquor which she had carried from the warehouse to the package store, she experienced a pain in her back. Then, after bending down to clean shelves, Ms. Wilson felt a sharp pain and could not stand straight. As a result, she was treated at the Naval hospital and prescribed Demerol and bed rest. A couple of days later, *Dr. M.K. Wiley* examined Ms. Wilson. She complained about low back pain with radiation into her right side, bottom, and leg. Upon examination, Dr. Wiley found some spinal spasms and tenderness on the right side. Dr. Wiley diagnosed low back pain with strain, prescribed Demerol and Valium and referred Ms. Wilson to an orthopaedist.

The next day, February 1, 1994, *Dr. John A. Glaser*, an orthopaedist, diagnosed acute lumbar strain with radiculopathy. In his examination, Dr. Glaser found tenderness in the lower lumbar area and right side. He recommended an MRI to evaluate any disc damage and a series of epidural shots. The subsequent MRI did not disclose the source for any pain. Likewise, Dr. Glaser reported the lumbar epidural "did not help her." Consequently, Dr. Glaser referred Ms. Wilson to a neurologist, Dr. Pritchard. He also prescribed another diagnostic MRI to evaluate bowel dysfunction and ordered physical therapy and a chronic pain management program with Dr. Nicholson.

[4]I take judicial notice of Dr. Kirven's board certification and have attached the certification documentation.

In a March 16, 1994 examination, *Dr. Paul Pritchard* noted Ms. Wilson's unspecified complaints of lumbar pain but he found no tenderness. Then, Ms. Wilson reported severe low back pain during straight leg lifts and yet she could sit upright without any complaints. Ms. Wilson had normal muscle tone without any atrophy. Dr. Pritchard could not detect any clear neurological abnormality and an EMG nerve test was negative. His impression was low back and leg pain.

In the summer of 1994, a psychologist concluded Ms. Wilson had major depression and other psychological factors affecting her physical condition.

For a month, starting mid-July 1994, Ms. Wilson was admitted to hospital in a rehabilitative chronic pain management program. During that treatment, a psychiatrist opined Ms. Wilson's bowel problems were associated with her lower back injury. On the other hand, *Dr. Ross A. Rames*, a urologist in late August 1994, believed the bowel dysfunction was related to stress. Nerve studies in the fall of 1994 suggested distal sensory neuropathy.

1995 In February 1995, Ms. Wilson suffered a right, lower leg contusion in a fall. At the end of that same month, she was treated a few days in the hospital for lower leg cellulitis and back pain management. A few days later, during his examination, *Dr. Steven C. Poletti*, of the Carolina Spine Institute, found Ms. Wilson's spine was straight. She had normal reflexes but her low back range of motion was decreased due to stated pain. Her straight leg raises and gait were normal. He observed that Ms. Wilson's lumbar MRI was normal with minor disc degeneration and some insignificant bulges, which were not consistent with her clinical presentation. Dr. Poletti did not think the nerve study from the fall of 1994 showed any problem because it was based on Ms. Wilson's subjective complaints of pain. He also opined the bowel dysfunction was not related to her back injury.

In June 1995, *Dr. Thomas H. Dukes*, another neurologist, examined Ms. Wilson. He noted obvious physical distress and that Ms. Wilson walked with a cane. His examination of her spine was unrevealing. Although she complained of pain during leg lifts, Dr. Dukes noted that the absence of any definite weakness in her extremities. Her sensations were intact. Dr. Dukes found no objective evidence from his examination, an EMG study, and a spinal fluid analysis of radiculopathy or a neural injury. Finally, he noted the three month gap between her accident and development of bowel problems seemed to suggest the problem was not related to her injury.

In September 1995, *Dr. John Nicholson* conducted another evaluation and concluded that Ms. Wilson's physical findings were consistent with her injury. She suffered from a debilitating chronic pain syndrome. According to Dr. Nicholson, Ms. Wilson could do sedentary work with a 10 pound lifting restriction. She also needed frequent changes in sitting and standing. In the same month, a psychiatrist indicated Ms. Wilson's anxiety and depressive disorders were not related to her January 1994 accident.

Finally, Dr. Kirven noted that Ms. Wilson had received physical therapy at the Medical University of South Carolina and that her history of depression went back to 1985. She has taken pain and anti-depression medication.

In light of the information in Ms. Wilson's record and his review of the surveillance video which showed Ms. Wilson walking, carrying, and moving furniture without any restriction or evidence of pain, Dr. Kirven reached several observations and conclusions. First, all the imaging and diagnostic tests have presented normal findings. Second, Ms. Wilson has neither a permanent, nor partial disability due to the January 1994 accident. Third, Ms. Wilson could return to her former work at the Naval Exchange. Fourth, he attributes Ms. Wilson's pain complaints and disability to her depression and personality disorder and her multiple major life stresses. Fifth, he concurs with Dr. Poletti that Ms. Wilson has no limitations or work restrictions.

Treatment Notes and Medical Opinion - Dr. John Nicholson
September 1997 to July 8, 1999 (EX 5 and EX 8)

In September 1997, Dr. Nicholson, board certified in physical medicine and rehabilitation,[5] treated Ms. Wilson for head and right side injuries associated with a motor vehicle accident. In October 1997, Ms. Wilson saw Dr. Nicholson due to "very bad" low back pain. She had pain shooting down her legs and experienced severe pain with little movement. In April 1998, Ms. Wilson experienced headaches and increased right knee and leg pain which she associated with her motor vehicle accident. At that time, Dr. Nicholson reported Ms. Wilson appeared "chronically distressed." Dr. Nicholson diagnosed chronic pain syndrome and administered an injection. In July 1998, Ms. Wilson again returned with headaches and continued back, right leg and ankle pain. With a few trigger point injections, Ms. Wilson had good pain relief. Dr. Nicholson saw Ms. Wilson in January 1999 for chest pain due to coughing. Overall, she reported her pain was much better. Finally, on February 18, 1999, during a follow-up examination for headaches, Ms. Wilson indicated that she had increased back spasms and decreased movement. Dr. Nicholson observed Ms. Wilson had less cervical flex. He planned physical therapy for the cervical issue.

On July 8, 1999, Dr. Nicholson reviewed the surveillance video and evaluated Ms. Wilson's level of function. In viewing the tapes from October 2 and October 3, 1998, Dr. Nicholson identified Ms. Wilson and noted she was performing numerous physical activities, including moving a refrigerator with a hand truck and helping to carry furniture. Dr. Nicholson characterized her movements as unguarded and unrestricted and concluded she was working at a medium duty work level. Since Ms. Wilson was able to conduct this work over the course of two days, Dr. Nicholson believed she demonstrated a "considerable improvement in her functional capacity." Dr. Nicholson also noted that based on office visits since October 1998, Ms. Wilson continues to have chronic pain problems and uses medication which both requires drug-

[5]I take judicial notice of Dr. Nicholson's board certification and have attached the board certification.

level testing and supports her pain complaints. However, Dr. Nicholson also commented that Ms. Wilson's chronic pain condition did not limit her ability to help move furniture. The video demonstrated Ms. Wilson's "remarkably improved tolerance to prolonged, repeated bending, lifting, and cervical spine flexion." On balance, Dr. Nicholson concluded Ms. Wilson could engage in "sedentary or light work on an ongoing basis."

Labor Market Survey - Ms. Lynn McCain
October 21, 1999 (EX 6 and EX 7)

Starting September 22, 1999, Ms. McCain, a certified rehabilitation counselor, reviewed Ms. Wilson's medical record. She also noted that Ms. Wilson, who is fifty-three years old, had completed 10th grade but received no other formal or vocational education. Ms. Wilson's work history included employment for several years as a pharmacy assistant, a sales attendant, and a sales associate. Based also in part on Dr. Nicholson's opinion that Ms. Wilson could engage in sedentary to light work, Ms. McCain prepared a labor market survey listing numerous job opportunities in the Charleston, South Carolina area. According to Ms. McCain, sedentary work involves sitting most of the time and requires the occasional lifting or carrying of up to 10 pounds. Light work increases the amount of exertion up to 20 pounds and may require to a significant degree of either walking and standing or sitting. With hourly wages ranging from the minimum of $5.15 to up to $8.35, the following jobs were identified: cashier (food, convenience store, and parking garage), sales clerk, clerk specialist, security guard, reservation specialist, counter attendant, assembler, and telephone collection clerk. On February 8, 2000, Dr. Nicholson reviewed the job listing and opined that Ms. Wilson was capable of performing every job. On March 2, 2000, Dr. Kirven found all the listed jobs acceptable for Ms. Wilson. Ms. McCain also provided a chart identifying the number of individuals working in various types of jobs in the local area. Notably, the survey showed nearly 5,500 people working as cashiers in sedentary or light work.

Medical Opinion - Dr. John A. Lucas
April 13, 2000 (EX 9)

On April 13, 2000, in response to an inquiry by Employer's counsel, Dr. Lucas, a board certified neurologist,[6] stated he had treated Ms. Wilson since September 1999. In his opinion, due to a work-related injury, which occurred several years ago, Ms. Wilson suffered chronic low back discomfort, spasms and occasional radicular pain. A recent MRI showed some mild degenerative disc disease. He believed the injury would require future medical evaluation and treatment. Due to her back condition, Ms. Wilson is limited to sedentary work with a 10 pound lifting restriction. She also may not be engaged in frequent stooping or bending and the job should not require prolonged standing. Dr. Lucas concluded that Ms. Wilson experiences other unrelated complaints that would further restrict her activities.

Sworn Testimony Presented by the Claimant

[6]I take judicial notice of Dr. Lucas' board certification and have attached the certification documentation.

Mr. Aubrey McDonald
(TR, pages 54 to 63)

[Direct Examination] Mr. McDonald helped Ms. Wilson move in October 1998. The process took about a week since neither one of them was in the best physical condition. Because Ms. Wilson had been physically threatened in her apartment, she decided to move. According to Ms. Wilson, the police had suggested that she move. During the move, they used a small hand truck. It was pretty evident to Mr. McDonald that Ms. Wilson was in pain. He noticed her taking medicine.

[Cross Examination] Mr. McDonald is about 65 years old, is six feet tall , and weighs 216 ("and dropping"). Mr. McDonald knew Ms. Wilson from their coffee class at Hardees. He had a truck and about a week before the move, Ms. Wilson told him that she had been unable to find anyone to help her. They moved the entire household including a refrigerator, chest of drawers, and a china cabinet. They moved the refrigerator on the hand truck so it was easy to get out. Mr. McDonald doesn't remember if the move occurred on a weekend. The move took more than two days so it also went into the week days. They moved a sofa and some chairs. They also carried a chest of drawers frame. He held one end and Ms. Wilson held the other. Ms. Wilson and Mr. McDonald did most of the move; her daughter helped one day. There were some stairs in the old apartment but the refrigerator was already downstairs. They simply slid the dresser down the stairs. The new apartment only had one small step up. At the new apartment, they would snatch the hand truck up over the one step.

Ms. Linda Wilson[7]
(TR, pages 64 to 856)

[Direct Examination] Ms. Wilson moved on October 2 and 3, 1998. Earlier, her estranged husband had broken into the apartment and assaulted her. She doesn't deny her physical activity on the videotape. But, under the circumstances, she feared for her life.

She couldn't find anyone to help her. She met Mr. McDonald at Hardees and he was good enough to help. After the move, she experienced pain. She was taking medication prescribed by Dr. Nicholson. She received the medication and pressure point injections into January 1999. She took Demerol, a pain medication, on the day she moved.

Two days prior to an appointment with Dr. Nicholson, she received a phone call from his office that he was not going to see anymore outpatients. So, she got an appointment with Dr. Wiley. Dr. Wiley

[7]Ms. Wilson appeared to be in some physical distress while testifying. She had taken pain medication prior to the hearing but was alert and responsive to the questions presented to her.

referred Ms. Wilson to Dr. Lucas who performed several tests. She visits him about every three weeks. She receives pressure point injections and had an epidural. Dr. Lucas uses Cortisone and Xylocaine.

Ms. Wilson's leg keeps going out. She has trouble sleeping and problems with bleeding. The condition has gotten worse and worse. She went to the Medical University and was diagnosed with torn colon. She will be seeing another physician for a second opinion. The blood loss makes her sick and she's been to the emergency room a few times.

[Cross Examination] The list of drugs set out in CX 1 were prescribed by several physicians. Dr. Nicholson was aware of the drugs that she was taking. The last time she saw Dr. Nicholson was February 1999. He performed her injections. When Dr. Nicholson didn't treat her anymore, she did not ask the Employer or the insurance representative for new doctor. She didn't know she was supposed to ask. And, she never submitted the prescription drug list.

Ms. Wilson still has a driver's license and drives. She drove to the deposition in October but not to the hearing. She does not have any vison problems. Ms. Wilson has not looked for work anywhere.

She must have called the insurer's agent about her move because she received her compensation check at the new address. After her move, sometime in November or December she saw either Dr. Nicholson or Dr. Wiley, but those were scheduled appointments.

[Examination by Administrative Law Judge] Ms. Wilson does not think she is capable of work because she lives with constant pain. She would work if she could. Her daughter and Ms. Walters help her. She can't sit or stand for a long time. She has taken a muscle relaxer and pain medication for over a year. Dr. Nicholson has been prescribing them, as well as Dr. Wiley and Dr. Lucas. She sees Dr. Wiley about every three months and regards her as the treating physician. She visited Dr. Lucas about a week and a half before the hearing. Her medication makes her thirsty and "woozy a little bit."

[Re-Direct Examination] Her medication bills have been paid by Medicare. She is not sure if the insurance company also paid some of those bills. Medicare also picked up the physician's bills. She receives $500 a month from Social Security for disability plus the workers' compensation.

Ms. Patricia Walters
(TR, pages 86 to 92)

[Direct Examination by Ms. Wilson] Ms. Walters has known Ms. Wilson for 25 years and has daily contact with her. Ms. Wilson takes her medication in the morning, then they go to lunch and she takes her medicine again. In the afternoon, they watch TV. She'll sit in a chair with an ice pack or heating pad. Ms. Wilson sometimes gets dizzy with her medication. Ms. Walters lives with chronic pain due to arthritis. Ms. Walters was a retail supervisor in a package store for over eight years but she stopped working in 1993.

She has been placed on disability. As a supervisor, Ms. Walters would not hire Ms. Wilson due to her limitations.

[Cross Examination] Ms. Walters receives her disability compensation from Social Security. She is aware that Dr. Nicholson is a director of a chronic pain program at the Medical University of South Carolina.

Documentary Evidence Presented by the Claimant

Walmart Pharmacy Drug Listing for Ms. Wilson
(CX 1)

The documents describe the purchase of multiple drugs from August 1995 to March 1, 2000. For most of the medicine after February 1997, the prescribing physician is annotated as Dr. Wiley. During this period, Dr. Nicholson also prescribed some drugs for Ms. Wilson. Starting in January 2000, Dr. Lucas also is listed as the prescribing physician.

Statement by Ms. Linda M. Wilson
March 25, 2000 (CX 2 and CX 3)

After being assaulted in her apartment by her estranged husband on September 28, 1998, Ms. Wilson decided to move to ensure her personal safety. She has reviewed the surveillance videotapes and notes that on those two days she was heavily medicated. After the move was complete, she collapsed with tremendous pain in her back and legs. In addition, while she may appear outwardly normal, Ms. Wilson can be in great pain, even unable to brush her hair or teeth. While the intensity of her pain varies, it remains constant. Her back and legs are exceptionally painful. If there was a way she could work, she would. Ms. Wilson can't even do her own housework.

Medical Treatment Notes and Opinion - Dr. John H. Lucas
(CX 4, CX 5, EX 10, and EX 11)

On January 25, 2000. Dr. Lucas, provided emergency treatment to Ms. Wilson. A couple of nights prior, Ms. Wilson had rolled in her bed and experienced an extremely painful muscle spasm with radiating, burning sensations down her legs. Ms. Wilson indicated that she suffered an injury to her back about five years ago when she fell off a stool and hit a concrete floor. She's had back pain since that accident. Ms. Wilson had been taking an array of drugs and reported that she was sleeping better and that

her vertigo and headaches were improved. Upon physical examination, Dr. Lucas observed Ms. Wilson was in physical discomfort and needed assistance to stand. She had give-away weakness in her lower extremities, normal strength in her upper extremities, and normal knee, hamstring and ankle reflexes in both legs. Her straight leg tests were positive. Based on her complaints of chronic pain, Dr. Lucas was concerned that she might have an acute herniation with radiculopathy. As a result, he ordered a diagnostic MRI.

In the follow-on treatment notes, dated January 28, 2000, Dr. Lucas reported the MRI proved "very unimpressive." The study did show Ms. Wilson suffered some "mild" degenerative disc changes. Since there was no defect to be repaired surgically and Ms. Wilson reported no relief from oral medication, Dr. Lucas recommended an epidural injection. Ms. Wilson received that injection on February 2, 2000.

In a February 9, 2000 medical summary, Dr. Lucas recalled that he first treated Ms. Wilson in September 1999. Since her work injury, Ms. Wilson has experienced chronic, but intermittent, back pain and spasms with radicular discomfort. An MRI revealed the presence of mild degenerative disc disease. Because Ms. Wilson didn't respond to oral medication, she received an epidural and experienced pain relief. Dr. Lucas opined that Ms. Wilson's complaints were related to her work injury; her condition was permanent; and she would need continued epidural injections.

State Solicitor Letter and Family Court Order
(CX 6)

An April 6, 1999 letter from a representative of the state solicitors office offers Ms. Wilson assistance as a victim of harassment. An October 13, 1998 Family Court Order restrained her husband from having contact with her through April 13, 1999 due his assault on Ms. Wilson.

Emergency Treatment Medical Notes - Dr. Iva L. Knapp
(CX 7)

On February 21, 1995, Ms. Wilson received medical care for a contusion and laceration on her right leg. Ms. Wilson reported that due to back pain and numbness on her right side, she falls easily. That afternoon, she fell down the stairs injuring her right leg. She reported taking Demerol and Prozac. She also reported walking with a cane. Dr. Knapp found no fracture and prescribed crutches and pain medication.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Stipulations of Fact

At my hearing the parties stipulated to the following facts: a) on January 29, 1994, Ms. Wilson suffered an injury that arose out of, and during, the course of her employment with the Employer; b) the Employer filed a timely first notice of injury and Ms. Wilson filed a timely claim for disability compensation; c) the average weekly wage at the time of injury was $172.50; d) initially the disability compensation rate was $172.50; and, e) at the time of the hearing, the compensation rate was $195.00 (TR, pages 22 to 25).

Modification

Under Section 22 of the Act, 33 U.S.C. § 922, any party in interest may request modification of a compensation order due a mistake of fact or a change in conditions.[8] 33 U.S.C. § 922. The central purpose of this provision is to render justice under the Act by giving the trier of fact wide discretion to modify a compensation order by considering newly submitted evidence or to further reflect on the evidence initially submitted. *Finch v. Newport News Shipbuilding & Dry Dock, Co.*, 22 BRBS 196 (1989), *O'Keefe v. Aerojet-General Shipyards*, 404 U.S. 254 (1971), and *Hudson v. Southwestern Barge Fleet Servs.*, 16 BRBS 367 (1984). At the same time, Section 22 is not intended to be a back door for retrying or litigating issues. *Delay v. Jones Washington Stevedoring Co.* 31 BRBS 197 (1998). The party requesting the modification has the burden of proof. *Vazquez v. Continental Maritime,* 23 BRBS 428 (1990). Although the Employer in this case is principally asserting a change in conditions, implicit in the Employer's submission of Dr. Kirven's medical opinion at my hearing is that a mistake of fact was made in the original adjudication. Accordingly, I will first evaluate the record to determine if there was a mistake of fact associated with Judge Barnett's November 14, 1996 decision.[9] Then, I will consider whether a medical or economic change in condition has occurred since Judge's Barnett's decision such that modification of her total disability compensation order is warranted. However, since both bases for modification are directly tied to Judge Barnett's compensation order, a review of her decision is necessary prior to adjudicating the present issues.

Decision and Order of Administrative Law Judge Edith Barnett
November 14, 1996[10]

In the case before her, while working through the total disability adjudicatory process,[11] Judge Barnett had to resolve issues concerning the significance of a surveillance video, conflicting medical opinion, and conflicting labor market specialist opinions.

---

[8]The parties did not dispute the timeliness of the employer's modification request.

[9]I have attached a copy of Judge Barnett's decision and order.

[10]The actual effective date of Judge Barnett's decision was the date the District Director formally issued the decision.

[11]I fully discuss this process in addressing Issue No. 2B, see page 24.

The Employer presented a ten minute surveillance video of Ms. Wilson's activities over the course of two days, July 19 and July 20, 1995. The film from the first day showed, in the morning, Ms. Wilson loading items into a car without much effort. The next day, in the morning, Ms. Wilson was observed walking without favoring a leg or using a cane. However, by late morning, Ms. Wilson limped and used a cane at her residence. After the hearing, Dr. Nicholson reviewed the videotape and concluded the observations did not alter his opinion that Ms. Wilson was disabled. He noted that film indicated that Ms. Wilson's pain varies but does exist. Likewise, the film demonstrated Ms. Wilson intolerance to activity. The Claimant's labor market specialist also asserted the film was consistent with Ms. Wilson's complaints of periodic pain.

Judge Barnett viewed the film at the hearing and found the film supportive of Ms. Wilson's claim because it demonstrated that after a long ride, Ms. Wilson had to use a cane to walk, which was consistent with her pain complaints, concurring with Dr. Nicholson and the labor specialist.

Ms. Wilson's case also contained an extensive medical record concerning her January 1994 injury. When an orthopaedic surgeon, Dr. Glaser was unable to determine the source of Ms. Wilson's back pain, he referred her in the summer of 1994 to Dr. Nicholson, a rehabilitation specialist and director of the university chronic pain program. About the same time, a neurologist, Dr. Gross, was also unable to find a neurological basis for her pain. As part of her care, Ms. Wilson participated in a three week in-patient pain rehabilitation program with Dr. Nicholson. Dr. Nicholson continued as her treating physician. In the fall of 1995, Dr. Nicholson, after concluding Ms. Wilson had obtained maximum medical improvement on June 28, 1995, opined that Ms. Wilson, due to pain in her back and diminished sensation in her right leg, would not be able to return to her former employment. Instead, she was limited to sedentary work for no more than four hours a day, with a 10 pound lifting restriction. As contrary evidence, the Employer introduced the opinion of an orthopaedic specialist, Dr. Poletti. After examining Ms. Wilson and reviewing her medical record which included normal EMG studies and near-normal scanning and imaging test results, Dr. Poletti concluded there was no physical basis for her pain complaints, which he considered genuine. Absent any pathology for the pain, Dr. Poletti concluded Ms. Wilson did not have an impairment. Finally, while one psychiatrist, Dr. Lowndes-Rosen, diagnosed Ms. Wilson with personality disorder unrelated to her injury, a treating psychiatrist, Dr. Roberts, believed Ms. Wilson's current symptoms were tied to the injury.

In resolving the medical disagreement between Dr. Nicholson and Dr. Poletti, Judge Barnett considered Dr. Nicholson's opinion "substantially more probative." In addition to being her treating physician, Dr. Nicholson's opinion was better documented and reasoned since he considered both the physical and psychological components of Ms. Wilson's injury. Whereas, Dr. Poletti based his finding of no disability solely on physical factors and did not reconcile his disability opinion with his belief that Ms. Wilson's pain complaints were genuine. Judge Barnett also found Dr. Lowndes-Rosen's opinion was not well documented or reasoned since the physician did not address Ms. Wilson's identified depression and

anxiety associated with her injury. Based on Dr. Nicholson's more probative assessment, Judge Barnett concluded Ms. Wilson could no longer return to her former employment, thereby establishing a *prima facie* case of total disability.

On the issue of suitable alternative employment, the Employer's specialist, Ms. Jubran, presented numerous job opportunities in the local area. However, the number of jobs was slowly reduced as she became more aware of restrictions imposed by Dr. Nicholson. On the other hand, the Claimant's labor market specialist, Mr. Bryson, believed Ms. Wilson was unemployable. Mr. Bryson contacted the employers identified by Ms. Jubran and presented Dr. Nicholson's restrictions. He found no positions available.

On considering these conflicting labor market specialists' opinions, Judge Barnett determined Mr. Bryson's opinion was better documented and reasoned. She found his assessment was based on a realistic evaluation of Ms. Wilson's work restrictions and was consistent with her medical record. Due to Mr. Bryson's more probative opinion, Judge Barnett concluded the Employer had failed to prove suitable alternative employment.

In conclusion, Judge Barnett held Ms. Wilson had proven total disability with a maximum medical improvement date of June 28, 1995. Since the Employer had failed to present sufficient evidence of suitable alternative employment, Judge Barnett determined Ms. Wilson was entitled to permanent total disability compensation as of June 29, 1995.

With the highlights of Judge Barnett's decision in mind, I next turn to the determination of whether she made a mistake of fact.

Issue No. 1 - Mistake of Fact

A mistake of fact may serve as a basis for modifying a compensation order. In that regard, a fact finder has broad discretion to correct mistakes of fact, as demonstrated by wholly new evidence, cumulative evidence, or merely further reflection. *O'Keefe*, 404 U.S. at 254. A party may seek a modification on the basis of a mistake of fact even if the compensation award based on the alleged mistake was affirmed on appeal. *Hudson,* 16 BRBS at 367. And, since facts relating to the nature and extent of the claimant's disability have been determined to be proper subjects for modification consideration (see *Allen v. Strachen Shipping Co.*, 11 BRBS 864 (1980)), I will focus on whether Judge Barnett made a mistake in her determinations of fact.[12]

In her November 1996 decision, Judge Barnett determined Ms. Wilson was totally disabled based

[12]In some cases, whether the mistake was factual or legal is a significant issue because the modification remedy is not available for a strictly legal error. *Swain v. Todd Shipyards Corp*., 17 BRBS 124 (1982).

on three essential findings. First, considering Dr. Nicholson's extensive treatment of Ms. Wilson, Judge Barnett found his opinion that Ms. Wilson could only tolerate sedentary work for half days most probative. In the hearing before me, the Employer has introduced Dr. Kirven's contrary medical opinion that Ms. Wilson was never disabled from returning to her job at the Navy Exchange. Since Dr. Kirven never examined Ms. Wilson nor treated her for her pain complaints and he based his decision on essentially the same medical record that Judge Barnett considered, I do not find a basis for disturbing her finding that Dr. Nicholson's opinion as treating physician was more probative.

Judge Barnett's second critical finding involved the impact of the ten minute surveillance film. While the video showed Ms. Wilson apparently unencumbered by an impairment at the beginning of the day, Judge Barnett observed, that by the end of the day, Ms. Wilson's movement had slowed and she had to rely on a cane for walking support. Upon consideration of the entire video, Judge Barnett found the surveillance evidence supported Ms. Wilson's impairment claim. In the present case, the Employer has submitted another surveillance video showing a different Ms. Wilson. But, I find the October 1998 videotape an insufficient basis for concluding that in 1995 Ms. Wilson did not suffer a significant, physically limiting impairment.

The last significant finding by Judge Barnett addressed suitable alternative employment. She resolved the conflicting labor market evidence in favor of Ms. Wilson's specialist because his study more accurately reflected Ms. Wilson's capacity for work as defined by Dr. Nicholson. The evidence of employment possibilities in October 1999 presently before me does not impeach the integrity of Judge Barnett's decision concerning the work opportunities available in 1995.

In summary, I am unable to conclude that Judge Barnett made a mistake of fact. Accordingly, I find no basis for approving a modification of Judge Barnett's November 14, 1996 Decision and Order based on a mistake of fact. Since the Employer is unable to prevail on this basis for a modification, I next consider whether a change in condition has occurred.

Change in Condition

If a party is not able to show a mistake of fact in a compensation order, he or she may still be able to modify a compensation order if there has been a change in physical or economic conditions. *Rizzi v. Four Boro Contracting Corp.*, 1 BRBS 130 (1974). However, it is important to note that the change in condition relates solely to injury which has been found to be caused by the work-place accident. In other words, unless there is an established mistake of fact, a party is not allowed to re-litigate the issue of casual relationship on the motion for modification based on change in conditions. *Leech v. Thompson's Dairy, Inc.*, 6 BRBS 184 (1977). In the case before me, the alleged change in condition relates to the extent of Ms. Wilson's disability due to her back injury and associated pain.

Issue # 2A - Change in Condition

The parties have stipulated Ms. Wilson suffered a work-related injury on January 29, 1994. Based on the injury histories in the various medical reports and Judge Barnett's summary, I also find that this injury occurred to Ms. Wilson's lower back as she was moving a case of liquor on January 29, 1994. The central component of Ms. Wilson's impairment was the chronic pain associated with the low back injury.

I will now evaluate the evidence developed since Judge Barnett decided in November 1996 that Ms. Wilson was totally and permanently disabled to determine whether there has been a change, notably an improvement, in Ms. Wilson's impairment. In that process, I must assess the relative probative weight of Ms. Wilson's testimony, the testimony of other individuals who observed her actions, her behavior on the surveillance videotape, and diverse medical opinions

Ms. Wilson's Testimony

According to Ms. Wilson, she lives with constant pain. She can't sit or stand for a long time. Although not contesting her physical activity on October 2 and 3, 1998, Ms. Wilson explains that she was fearful of her estranged husband. After the move, she did struggle with pain and she takes medication prescribed by several doctors, including Dr. Nicholson, and receives pain-relief injections from Dr. Lucas. She continues to have trouble with her legs.

Testimony of Mr. McDonald and Ms. Walters

Mr. McDonald observed that Ms. Wilson appeared to be in pain. Ms. Walters described Ms. Wilson medication routine and indicated the medicine may make Ms. Wilson dizzy. Ms. Walters also observed Ms. Wilson's use of an ice pack or heating pad for back pain relief.

Surveillance Video

Since Ms. Wilson's injury relates to her lower back and its associated pain, the surveillance video of her activities over the course of two-day move presents particularly relevant evidence of Ms. Wilson's observable impairments.

On October 2, 1998, from about 9 a.m. to nearly 4 p.m., Ms. Wilson engages in the strenuous activity of moving household items from one building to another location by loading and then unloading a pickup truck and a car. Over the course of the day, assisted by one man and using a regular size pickup truck, Ms. Wilson loads and unloads the following items: a refrigerator, glass front cabinet, several small to medium size furniture pieces, top piece to a desk, small sofa, two seat sofa, one drawer desk top, and a small cabinet. Throughout this process, Ms. Wilson carries one-half of the items' weight. She helps

maneuver several large items onto the truck's bed, including notably a standard-sized refrigerator. In moving these items, Ms. Wilson shows no hesitation in making the necessary bending, lifting, carrying, twisting, and pulling motions. At one time, Ms. Wilson swiftly raises her right leg nearly chest-high to place it on a tailgate for leverage and then, in a snap, hoists herself up onto the tailgate. On another occasion, Ms. Wilson raises both arms nearly over her head while supporting the weight of a piece of furniture. Periodically during this day, Ms. Wilson also moves several smaller household articles and clothes with a car. As she places items into the car's interior and trunk and then later removes them, Ms. Wilson shows normal dexterity. She freely bends and twists at the waist and is able to bend over and reach through an open car door to retrieve household articles. Over the course of this day, Ms. Wilson does not show any signs of fatigue or physical weakness, or side-effects from medication. Her walk, gait, arm and leg movements, bending and twisting motions appear to be normal and unrestricted. She appears alert and attentive to the details of the move. Throughout the day, she does not limp, favor either side of her body, use a cane, or display any sign of a physical impairment. Even after several hours of constant physical activity, there is no change in Ms. Wilson's normal-appearing physical demeanor.

On the second day of the move, Ms. Wilson no longer assists in moving heavy furniture items. But, she still spends a good portion of the day from sometime after 9 a.m. to about 1 p.m., moving clothes and small household articles in her car. Ms. Wilson carries bundles of clothes in her arms and on several occasions she holds items in both arms. Throughout the day, Ms. Wilson's movement and physical activities seem normal. She maintains a steady pace of moving activity without any signs of physical distress or drowsiness. Her walk is normal and her pace is steady. There is no sign of a limp and Ms. Wilson never uses a cane. All her maneuvers, including bending and twisting at the waist, during the exit and entry of a car are fluid; she shows no signs of any physical restrictions.

Medical Opinion[13]

After conducting an extensive review of Ms. Johnson's medical record through 1995, Dr. Kirven viewed the videotape of Ms. Johnson's activities in October 1998 and noted that Ms. Wilson displayed on the tape a capability to perform diverse physical movement without pain. Consequently, he opined Ms. Johnson had no limitations or work restrictions. He even concluded, in part based on that tape, that Ms. Johnson could return to her former work with the Naval Exchange. He attributed any expressed pain symptoms to either depression or other life stressors.

Dr. Nicholson, who first saw Ms. Wilson in the summer of 1994 about her injury and served as her treating physician into 1999, was well aware of both Ms. Wilson's chronic pain syndrome and her prescribed medication. With his medical familiarity of Ms. Wilson as a back drop and upon viewing Ms. Wilson's videotaped activities in October 1998, Dr. Nicholson concluded she had displayed a

[13]By reference, Dr. Kirven introduced the medical reports of physicians who evaluated and treated Ms. Wilson during 1994 and 1995, prior to Judge Barnett's decision. The relevant medical opinions for my inquiry at this stage is only the medical opinion developed since November 1996 that addresses Ms. Wilson's medical condition since the administrative law judge decision.

"considerable improvement" in her functional capacity. He noted Ms. Wilson engaged in extensive physical activities, including moving a refrigerator, which reached a medium level of work. In addition, Ms. Wilson was able to sustain her physical efforts over the course of two days. Dr. Nicholson still didn't doubt the sincerity of Ms. Wilson's pain complaints or the potential effects of her medication, but he believed the videotape demonstrated her tolerance had improved to the extent that her chronic pain syndrome did not preclude prolonged physical activity. In light of her demonstrated improved capacity for prolonged physical movement and flexion, and considering her medical record, Dr. Nicholson opined Ms. Wilson was now capable of sedentary to light work.[14]

Dr. Lucas started treating Ms. Wilson in the fall of 1999. He last treated her in February 2000 for chronic, intermittent back pain and spasms. Based on his evaluations, he believes Ms. Wilson has suffered a reoccurrence of back spasms. This back condition is a permanent work-related injury that will require future medical treatment. Due to her back problems, Ms. Wilson is limited to sedentary work with a 10 pound lifting limitation. In addition, she has other ailments that further restrict her activities.

Discussion

As previously noted, Judge Barnett found Ms. Wilson unable to return to work due the pain and physical impairment associated with her back injury. In analyzing whether Ms. Wilson's back situation has improved since Judge Barnett's decision, I am confronted with a dispute between the testimony of Ms. Wilson and others witnesses presented at my hearing, Ms. Wilson's videotaped activities, and medical opinion. Due to this conflict of evidence, I must assign relative probative value.

In that regard, I consider both the surveillance video and medical opinion more probative than Ms. Wilson's testimony and the observations of Mr. McDonald and Ms. Walters. Ms. Wilson and the other witnesses appeared credible and the physicians associated with Ms. Wilson's case do not doubt the sincerity of her pain complaints, But, their observations may be affected by their subjective filters. On the other hand, the lens of the video camera presents an unfiltered and objective view of the real impact of Ms. Wilson's pain on her activities. Likewise, the physicians will generally provide a more objective view of the pain's consequences based on objective medical tests and findings.

I recognize that the six hour video presented in this case is only a minute snapshot of Ms. Wilson's life and does not cover every day of her activities since November 1996. However, both the duration and nature of the physical activity chronicled on that film stand in stark contrast to the short video Judge Barnett observed. The 1995 film showed Ms. Wilson incapable of enduring even a car trip. As a consequence

[14]Although Dr. Nicholson did not specifically state the length of the work day for Ms. Wilson, he subsequently approved as suitable employment for Ms. Wilson job descriptions that involved full time work (EX 6).

of little physical demand, Ms. Wilson started to limp and needed a cane to walk. However, by October 1998, the videotape shows that Ms. Wilson is capable of enduring the two day-long rigors of a move without any observable symptoms of pain or physical impairment. Over the course of the entire tape, Ms. Wilson does not limp or use a cane. On the contrary, Ms. Wilson actively and fully engages in moving furniture and innumerable items of a household. She lifts, carries and maneuvers her share of the load consisting of heavy pieces of furniture and a refrigerator without any noticeable hesitation and or physical limitation. Likewise, she accomplishes multiple car trips without any demonstrable adverse physical side-effects.

I also understand Ms. Wilson may have had exceptional motivation to quickly move her household, and I have considered the possible benefits of pain medication at that time. However, the videotape demonstrates that despite her perception of chronic, disabling pain, and any potential drug side-effects, Ms. Wilson's condition apparently improved by October 1998 to the extent that she is capable of performing extensive, arduous, and prolonged physical activity involving her back without any signs of impairment, adverse medication reactions, or demonstrative evidence of pain.

I consider medical opinion also more probative in relation to Ms. Wilson's subjective pain complaints. However, notably, the three physicians who considered Ms. Wilson's condition since November 1996 have expressed differing views about her condition and ability to return to work, ranging from no work restrictions to fairly restricted.

Dr. Kirven, based on his medical record review and viewing of the 1998 surveillance video, concluded Ms. Wilson has no disability and is capable of returning to her former employment with the Navy Exchange. Dr. Nicholson, based on his familiarity with Ms. Wilson's case and viewing of the 1998 videotape, determined that Ms. Wilson was capable of returning to work at sedentary or light work. And, Dr. Lucas, who has treated Ms. Wilson for about six months, would restrict Ms. Wilson to sedentary work with a 10 pound lifting limitation. He also suggests that Ms. Wilson has other problems that would further restrict her activities.

For the several reasons, after considering the relative probative value of this diverse range of medical opinion, I find Dr. Nicholson's assessment of Ms. Wilson's disability the most probative. Turning first to Dr. Lucas' evaluation, he does present the most recent medical information concerning Ms. Wilson's back spasms, which indicates as both Dr. Lucas and Dr. Nicholson opined, that she has a chronic back condition. However, Dr. Lucas' assessment is not as well documented as the other two physicians because he did not view the October 1998 videotape and observe the depth and breadth of her physical activity on those two days. In addition, both Dr. Kirven and Dr. Nicholson are more familiar with her long history of medical treatment and the results of objective medical tests. Due to his less than complete consideration of all the documentation in the record, including the videotape, I find his opinion has diminished probative value.

Dr. Kirven's opinion also has diminished probative value for two reasons. First, while he viewed portions of the October 1998 videotape, Dr. Kirven did not consider the additional medical evidence in the record that developed since November 1996. Instead, he limited his medical review to the record that was before Judge Barnett. However, both Dr. Nicholson and Dr. Lucas establish that Ms. Wilson has received additional treatment for her back problems since Judge Barnett's decision. As a result, his opinion is not as well documented as Dr. Nicholson's opinion. Second, his opinion is not well reasoned. Without much explanation, Dr. Kirven concluded that Ms. Wilson's pain complaints and disability were due to her diagnosed personality disorder, depression and life stresses that were not related to her injury. However, the psychiatrists who evaluated Ms. Wilson disagreed on whether her depression was tied to her injury. As Judge Barnett pointed out, the treating psychiatrist believed Ms. Wilson's depression and her injury were related. Dr. Kirven did not provide any explanation for choosing the other psychiatric diagnosis.

In contrast, Dr. Nicholson presented the best documented and reasoned medical opinion in the record. From the summer of 1994 through January 1999, Dr. Nicholson had extensive contact with Ms. Wilson, both on an in-patient and out-patient basis, during the course of her treatment for back pain. His in-depth familiarity with her condition, related medical tests and treatment gave Dr. Nicholson an exceptionally firm foundation for his assessment of her ability to return to work. Dr. Nicholson was also uniquely situated to consider any change in her medical condition because he is the only physician who viewed both the July 1995 video and the October 1998 tape and evaluated and treated Ms. Wilson both before and after Judge Barnett's November 1996 decision. Based on Ms. Wilson's demonstrated capacity in October 1998 to physically perform medium level work, Dr. Nicholson noted remarkable improvement in Ms. Wilson's physical tolerance. At the same time, Dr. Nicholson recognized Ms. Wilson continued to struggle with chronic pain after October 1998 and continued to take pain medication. Accordingly, in reaching his conclusion that Ms. Wilson can now work a full day at a sedentary or light work level, Dr. Nicholson integrated Ms. Wilson's demonstrated physical capacity to work at a medium level in October 1998 with her subsequent complaints of chronic pain, which he considered real, and the effects of her pain medication.

In summary, the revealing and probative October 1998 videotape, coupled with Dr. Nicholson's more probative medical opinion, outweighs the subjective assessments of Ms. Wilson, the observations of Mr. McDonald and Ms. Walters, and other medical opinions concerning her ability to work. The preponderance of the more probative evidence demonstrates that Ms. Wilson now has the capacity to work a full day at a sedentary to light work level. That ability represents a change since Judge Barnett's November 1996 finding that Ms. Wilson was capable of only a half day of sedentary work. Judge Barnett relied on 1995 videotape and Dr. Nicholson's 1995 medical opinion to conclude Ms. Wilson was significantly restricted in her work capability. Similarity, I now rely on the same physician and a more recent videotape to find that Ms. Wilson's ability to endure work has improved. Consequently, I find the Employer has prevailed in establishing a change in the medical condition of Ms. Wilson's back condition.

Since there has been a change in Ms. Wilson's medical condition, I must next determine whether that change has altered Ms. Wilson's entitlement to permanent total disability compensation.

Issue No. 2B - Extent of Disability

The question of the extent of a disability, total or partial, is an economic as well as a medical concept.[15] *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128,131 (1991). The Act defines disability as an incapacity, due to an injury, to earn wages which the employee was receiving at the time of injury in the same or other employment. *McBride v. Eastman Kodak Co.*, 844 F.2d 797 (DC Cir. 1988). Total disability occurs if a claimant is not able to adequately return to his or her pre-injury, regular, full-time employment. *See Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190, 194 (1984). A disability compensation award requires a causal connection between the claimant's physical injury and his or her inability to obtain work. The claimant must show an economic loss coupled with a physical and/or psychological impairment. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). Under this standard, a claimant may be found to have either suffered no loss, a partial loss, or a total loss of wage-earning capacity.

Determining the extent of a disability, and consequently whether an award of disability benefits is appropriate, involves a three step process. *SEACO and Signal Mutual Indemnity Assoc., Limited v. Bess*, 120 F. 3d 262 (4th Cir. 1997) (unpublished); see also, *Newport News Shipbuilding & Dry Dock Company v. Tann*, 841 F.2d 540, 542 (4th Cir.1988). As a first step, to establish a *prima facie* case of total disability, whether temporary or permanent in nature, a claimant has the initial burden of proof to show that he or she cannot return to his or her regular or usual employment due to work-related injuries. This evaluation of loss of wage earning capacity focuses both on the work that an injured employee is still able to perform and the availability of that type of work which he or she can do. *McBride*, 844 F. 2d at 798. A claimant's credible testimony of considerable pain while performing work may be a sufficient basis for a disability compensation even though other evidence indicates the claimant has the capacity to do certain types of work. *Mijangos v. Avondale Shipping, Inc.*, 948 F. 2d 194 (8th Cir. 1999) and *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). In addition, a physician opinion that the employee's return to his usual or similar work would aggravate his condition may also be sufficient to support a finding of disability. *Case v. Washington Metro. Area Transt. Auth.*, 21 BRBS 248 (1988).

In the second step, if the claimant is able to demonstrate he or she is unable to return to his or her former job, then the employer has the burden of production to show that suitable alternate employment is

[15]Based on Dr. Nicholson's determination that Ms. Wilson continues to suffer with chronic pain, which is supported by Dr. Lucas' diagnosis of a permanent condition, I find the nature of her disability remains permanent. Since Ms. Wilson's improved physical capabilities seem to be related to an increased tolerance for pain rather than any response to medical treatment, I also concur with Judge Barnett's finding that the date of maximum medical improvement is June 28, 1995, as indicated by Dr. Nicholson.

available. *Nguyen v. Ebbtide Fabricators*, 19 BRBS 142 (1986). The availability of suitable alternative employment involves defining the type of jobs the injured worker is reasonably capable of performing, considering his or her age, education, work experience and physical restrictions, and determining whether such jobs are reasonably available in the local community. *Newport News Shipbuilding and Dry Dock Co. v. Director,* OWCP, 592 F.2d 762, 765 (4th Cir. 1978) and New *Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981). The showing of available suitable alternative employment may not be applied retroactively to the date of maximum medical improvement. An injured worker's total disability becomes partial on the earliest date that the employer shows suitable alternative employment. *Palombo v. Director, OWCP*, 937 F.2d 70 (2d Cir. 1991) and *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991).

And, at the third step, if the employer demonstrates that suitable alternate employment was available, then to meet his or her burden of proof, the claimant must show he or she has tried to obtain such alternate employment but has been unable to do so. *Newport News Shipbuilding &Dry Dock Shipping Corp. v. Director, OWCP,* 784 F. 2d 687 (5th Cir. 986), *cert.* denied, 479 U.S. 826 (1986). New *Orleans (Gulfwide) Stevedores v*. Turner, 661 F.2d 1031, 1043 (5th Cir. 1981) *rev'g* 5 BRBS 418 (1977) and *Williams v. Halter Marine Service*, 19 BRBS 248 (1987). Otherwise, the extent of the employee's disability is partial, not total. *Director, Office of Worker's Compensation Programs v. Berkstresser*, 921 F. 2d 306, 312 (D.C. Cir. 1991).

At the end of this three-step process, if a claimant does not meet the burden of proof for total disability, then he or she is considered employable and, at the most, his or her disability is partial, not total. *See Southern v. Farmers Export Company*, 17 BRBS 64 (1985).

Prima Facie Case of Total Disability

Prior to her injury, Ms. Wilson worked as a sales associate at a Navy Exchange Minimart package store. Although the record before me contains little information on the physical requirements of that job, Judge Barnett summarized Ms. Wilson's activities as a Navy Exchange Employee (Judge Barnett's Decision and Order, page 3). In addition to serving customers, running a cash register and cleaning, Ms. Wilson had to stock shelves with liquor and wine bottles. On the day of her injury, Ms. Wilson experienced a sharp pain in her back after moving a case of 12 rum bottles. Shortly thereafter, after being told to clean and move forward for inventory a three gallon jug of wine, Ms. Wilson fell off a stool. In light of these job activities, Ms. Wilson's work required her to be to lift, carry and move items weighing just over 26 pounds.[16]

[16]Since a liter of water weighs 2.2 pounds, and the rum bottles usually come in liter bottles, I find a case of liquor weighs at least 26.4 pounds. Likewise, if a gallon of water weighs 8.3 pounds, a three gallon wine jug weighs at least 24.9 pounds.

(continued...)

I have determined that Ms. Wilson is now capable of performing sedentary to light work. According to Ms. McCain, the description of sedentary work includes the ability to exert up to 10 pounds of force and light work increases that exertion level up to 20 pounds (EX 6). As a result, the heaviest load Ms. Wilson is able to lift, carry or move is 20 pounds. That physical capacity is less than the level of exertion, 26 pounds, required in her former employment. Since Ms. Wilson does not have the physical strength due to her back injury to meet the requirements of her former employment at the Navy Exchange, she continues, despite the improvement in her medical condition, to be able to establish a *prima facie* case of total disability.

Suitable Alternative Employment

Since Ms. Wilson has established a *prima facie* case of total disability, the Employer in the second step of the disability adjudication process has an opportunity to rebut the *prima facie* case of total disability by showing suitable alternative employment.

In determining whether suitable alternative employment exits, I am guided by the following two questions. First, considering the Claimant's age, education, work experience, intellect, and physical restrictions, what can she physically and mentally accomplish? *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F. 2d 103, 1042 (5th Cir. 1981). Second, within the category of jobs the Claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the Claimant is able to compete and realistically secure? *Id. See also, Edwards v. Director, OWCP*, 99 F.2d 1374 (9th Cir. 1993), *cert. denied* 114 S.Ct. 1539 (1994). As a result, I must determine Ms. Wilson's employment capabilities and whether any jobs suitable to those capabilities are available.[17]

Employment Capabilities

In considering the various employment factors, I find Ms. Wilson is an intelligent, articulate late-middle aged person, who is still well within the productive range of an adult. While her formal education apparently stopped after the 10th grade, she has work experience of nearly ten years as a sales associate and attendant. In addition, during her five years at a drugstore, she advanced from pharmacy technician to manager (EX 6). Ms. Wilson also possesses a driver's license.

Concerning Ms. Wilson physical capabilities, I have determined Dr. Nicholson's assessment of her work capacity to be the most probative. As previously discussed, Dr. Nicholson believes Ms. Wilson is

---

[16](...continued)

[17]In addition, the extent of the Claimant's employment opportunities is based on her vocational capabilities at the time of the hearing. *See Hayes v. P&M Crane Co.*, 23 BRBS 389 (1990), *vacated on other grounds, P&M Crane Co. v. Hayes*, 930 F.2d 424 (1991).

capable of full time work at a sedentary or light work level.

Available Suitable Jobs

Having determined Ms. Wilson's employment capabilities, I must next determine whether the Employer has presented sufficient evidence of employment opportunities in the Charleston, South Carolina, area suitable to her capabilities.

Ms. McCain, a certified rehabilitation counselor, prepared a labor market survey, dated October 21, 1999 (EX 6). To determine appropriate jobs, Ms. McCain used Dr. Nicholson's restriction of sedentary to light work. This labor market survey contains a wide range of job opportunities that are reasonably available in the Charleston, South Carolina area, with only sedentary and light duty requirements. Dr. Nicholson, the physician I consider to be in the best position to assess Ms. Wilson's physical capabilities, reviewed the job list and annotated that Ms. Wilson was capable of performing every job listed. I have also reviewed the list and find that without exception the job requirements listed for each job fit within the sedentary to light work categories and are suitable to Ms. Wilson's physical capabilities. Based on this labor market survey, I find the Employer has established that as of October 21, 1999, suitable alternative employment was available for Ms. Wilson.

Ms. McCain expressed an opinion that the jobs in her October 1999 list would also have been available to Ms. Wilson in October 1998. However, the survey itself contains only one or two jobs that indicate they are frequently available. As a result, I find Ms. McCain's opinion insufficient to establish that these same identified jobs were also available in October 1998.

Employment Efforts

At this point, Ms. Wilson has established a *prima facie* case of total disability and the Employer has shown the availability of suitable alternative employment. So, I must now consider the third step in the total disability analysis - whether Ms. Wilson has demonstrated a willingness to work and whether reasonable and diligent efforts to obtain such alternative employment have been futile and fruitless.

Ms. Wilson testified that she has not looked for work. Instead, she believes due to her constant pain that she is unable to work. Although Ms. Wilson's belief may be sincere, I have determined that she is capable of work. Due to the absence of any effort to find employment, Ms. Wilson has failed to show that the multitude of varied, sedentary and light work jobs identified by the Employer were not viable job opportunities.

Conclusion

Although Ms. Wilson is unable to return to work with the Navy Exchange, the Employer has established the presence of viable, suitable alternative employment in the Charleston, South Carolina area by October 21, 1999. In response, Ms. Wilson has failed to prove such job opportunities were not reasonably available. Accordingly, I find that as of October 21, 1999, Ms. Wilson's total disability became partial. *See Palombo v. Director, OWCP*, 937 F.2d 70 (2nd Cir. 1991) (total disability becomes partial on the earliest date that the employer establishes suitable alternative employment).

Issue No. 3 - Compensation for Permanent Partial Disability

As of October 21, 1999, Ms. Wilson's permanent total disability became a permanent partial disability. Any compensation for such a disability will be based on any adverse effect such a disability has on her ability to earn an income.

For permanent partial disability, Section 8 (c), 33 U.S.C. § 908 (c), sets out a schedule of compensation for numerous specific physical impairments or losses. But, Mr. Wilson's back injury is not one of the scheduled injuries. Instead, compensation for her permanent partial disability involving her back is determined by Section 8 (c) (21). Section 8 (c) (21) bases permanent partial disability compensation on two-thirds the difference between the average weekly wage of the employee and the employee's wage-earning capacity thereafter in the same or another employment. The determination of wage-earning capacity used in the Section 8 (c) (21) calculation is defined by Section 8 (h). Any compensation is payable during continuance of the partial disability.

Section 8 (h) specifies that the wage-earning capacity of an injured employee under Section 8 (c)(21) is determined by her actual post-injury earnings, if those earnings reasonably and fairly represent her wage-earning capacity, or a reasonable wage earning capacity based on the nature of the injury, usual employment, and other factors. In addition, the courts and Benefits Review Board ("BRB" or "Board") have indicated the post-injury wage-earning capacity must be adjusted to the wage levels which the job paid at the time of the injury. *See Walker v. Washington Metro Area Transit Authority*, 793 F.2d 319, 321 n.2 and 323 n. 5 (DC Cir. 1986)[18] and *Bethard v. Sun Shipbuilding & Dry Dock Co.* 12 BRBS 691, 695 (1980).[19] Also, at least one court has stated that the reimbursement for loss of wage-earning

[18]The Circuit Court noted that in order to make a fair comparison between wages, the Board uses the amount the post-injury job paid at the time of the claimant's injury, allowing the Board to compare wages without worrying about the effect of inflation.

[19]According to the BRB, Sections 8 (c) and 8 (h) require that the wages earned in a post-injury job be adjusted to represent wages which that job paid at the time of the claimant's injury. The Board explained, "This insures that wage-earning capacity is considered on equal footing with the determination under Section 10 of average weekly wage 'at the time of the injury' . . . During times of rapid economic inflation or deflation , the passage of even a few years can have a significant effect on the worker's wages and thereby distort the calculation of lost wage-earning capacity due to the injury."

capacity should be a fixed amount, "not to vary from month to month to follow current discrepancies." *White v. Bath Iron Works Corp.* 812 F. 2d 33, 34 (1st Cir. 1987).

With these principles in mind, I first find, based on the parties' stipulation of fact, that the average weekly wage at the time of Ms. Wilson's injury was $172.50. Next, since Ms. Wilson did not have actual post-injury earnings, I look to the wages set out in the labor market survey as a reasonable basis for determining her wage-earning capacity. The wages in the survey ranged from $5.15 per hour to over $8.00. In light of Ms. Wilson's long term break in employment and her education level, I find her reasonable wage-earning capacity to be $5.15 per hour, which represents a weekly income of $206.00.

Because the critical date for the determination of the amount of disability compensation is the date of injury, the BRB in *Richardson v. General Dynamics Corp.*, 23 BRBS 327, 330 and 331 (1990), stated post-injury wages must be adjusted to wage levels that were paid at the time of injury. According to the BRB, since the U.S. Department of Labor National Average Weekly Wage ("NAWW") is a more accurate reflection of wage changes over time than the Consumer Price Index, the post-injury wages should be adjusted downward to the time of injury using the NAWW. In *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4, 7 (1988), the BRB further explained that in order to neutralize the effect of inflation, an administrative law judge must adjust the post-injury wage level to the level paid pre-injury so that the wage can be compared to the pre-injury average weekly wage.

Based on the rationale set out in *Richardson* and *Cook*, I need to translate Ms. Wilson's October 1999 weekly wage-earning capacity back to the wage level existing at the time of her injury in January 1994, using the National Average Weekly Wage ("NAWW") from 1994 and 1999. In January 1994, the NAWW was $369.15. As of October 1999, the NAWW was $450.64. Using the ratio of these two NAWW figures, 0.819 (369.15/450.64), to bring Mr. Wilson's October 1999 average weekly wage down to the January 1994 wage level, I find her October 1999 average weekly wage of $206.00 represents a January 1994 weekly wage earning capacity of $ 168.75 ($206.00 x 0.819).

After the adjustment based on NAWW changes, Mr. Wilson's October 1999 weekly post-injury earning capacity, in January 1994 wage levels terms, is $168.75. That post-injury earning capacity is less than her pre-injury average weekly wage of $172.50. Consequently, under Section 8 (c) (21) of the Act, Ms. Wilson is entitled to two-thirds of the difference between her pre-injury average weekly wage of $172.50 and her post-injury wage earning capacity of $168.75, or about $2.50 (($172.50 - 168.75) x 2/3).

ORDER

Based on my findings of fact, conclusions of law, and the entire record, I issue the following order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

1. The November 1996 Decision and Order issued by Administrative Law Judge Edith Barnett is **MODIFIED IN PART** as follows:[20]

A. The Employer shall pay Ms. LINDA M. WILSON compensation for **TEMPORARY TOTAL DISABILITY**, due to an injury to her back on January 29, 1994, from January 30, 1994 through June 28, 1995, based on an average weekly wage of $172.50, such compensation to be computed in accordance with Section 8 (b) of the Act, 33 U.S.C. § 908 (b); and,

B. The Employer shall pay Ms. LINDA M. WILSON compensation for **PERMANENT TOTAL DISABILITY**, due to an injury to her back on January 29, 1994, from June 29, 1995 through October 20, 1999, based on an average weekly wage of $172.50, such compensation to be computed in accordance with Section 8 (a) of the Act, 33 U.S.C. § 908 (a); and,

C. The Employer shall pay Ms. LINDA M. WILSON compensation for **PERMANENT PARTIAL DISABILITY**, due to an injury to her back on January 29, 1994, from October 21, 1999 and continuing, based on the difference between her pre-injury average weekly wage of $172.50 and her post-injury, weekly wage-earning capacity of $168.75, such compensation to be computed in accordance with Section 8 (c) (21) of the Act, 33 U.S.C. § 908 (c) (21).

2. The Employer shall receive credit for all amounts of compensation previously paid to the Ms. LINDA M. WILSON as a result of the back injury on January 29, 1994.

SO ORDERED:

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Washington, D.C.

[20]The provisions in Judge Barnett's Decision and Order concerning medical care and treatment, and the payment of a 10% penalty and interest are not modified by my order.